No. 209.
Br. of Raney for Def.
Filed Mar. 10, 1902.

Office Supreme Court U.S.
FILED
MAR 10 1902
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Supreme Court of the United States

OCTOBER TERM, 1901.

No. ~~205~~ 209.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

GEO. P. RANEY,
Counsel for Defendant in Error.

Tallahassean Job Print, Tallahassee, Florida.

Supreme Court of the United States
OCTOBER TERM, 1901.

No. 505.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

Brief of Mr. George P. Raney for Defendant in Error.

This cause was heard upon the demurrer of the Defendant in Error to the bill of complaint of the Plaintiff in Error, and there was a decree in the Circuit Court of Florida, sitting in Chancery in and for Leon county, dismissing the bill, and, on appeal, the Supreme Court of Florida affirmed such decree. The decision of the Supreme Court of Florida is reported in 28 Southern Reporter, 810, and will appear in Vol. 42 of Florida Supreme Court Reports, and is in the Transcript of the Record, pp. 27-35. Such Florida statutes as are deemed necessary to the decision of this case are printed at the end of this brief, where not set out in the body of it.

I.

The first inquiry to be made is as to the alleged exclusive rights, privilege or franchise of the Plaintiff in Error, The Capital City Light and Fuel Company. Any exclusive right

is not claimed as a matter of immediate or direct grant to itself, but as acquired by assignment from the Tallahassee Gas and Electric Light Company, through W. A. Rawls, who was a purchaser at a mortgage foreclosure sale of certain properties of the last named company.

What were the exclusive privileges or franchises of the Tallahassee Gas and Electric Light Company? Such company was a body corporate organized under a Florida statute, entitled "An Act to provide for the creation of corporations and to prescribe their general powers and duties," approved August 8th, 1868, being Chapter 1639 of Laws of Florida. Section 1 thereof provided that "any number of persons may associate themselves and become incorporated for the transaction of any lawful business of a public or private nature, including all works of internal improvement;" and, section 2, shall have succession by its corporate name for twenty years or a period to be limited in the charter of incorporation, and hold, buy and mortgage and convey such real and personal property as the purposes of the corporation may require, and as it may be necessary to acquire in order to obtain or secure any indebtedness to the company, and the other powers ordinarily incident to business corporations; and, section 10, that it shall be lawful for the president and directors, or their authorized agents, to enter upon any land or lands, *public or private*, necessary to the business contemplated in its articles of association, or to take from any lands most convenient to their works any timber, stone, earth or other materials which may be necessary for the construction of and keeping in repair its works and improvements; and, section 11, that whenever the corporation shall take possession of and use any land, timber, stone or other material *owned by private* individuals for the route and site of its works, or for the construction and keeping in repair the same, or any part thereof, and the parties can not agree upon the value of the damages sustained, the corporation may apply to the Circuit Court for a writ of *ad quod damnum;* and, section 37, it is declared that nothing contained in the act shall be construed to extend to

any county or township or to any public university, academy, seminary, school or other religious corporation incorporated by the laws of this State; and other sections provide for subscription to and increase of capital stock, stockholders meetings, and make other provisions and regulations appertaining only to business corporations. By an act of 1874, certain sections of this act were repealed, but they were re enacted by Chapter 3165, approved March 11, 1879: McClellan's Digest Laws of Florida, pp. 226-236. It is, however, upon the 38th section of this statute (which section is Section 30 on page 234 McClellan's Digest) that great reliance is placed by Plaintiff in Error for its contention. Its provisions are: "Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation; Provided, however, That this investment shall not so operate as to divest any future Legislature of those powers of government which are inherent and essential attributes of sovereignty, to-wit: the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like." This section, as well as the others mentioned above, was in force at the time of the incorporation of the Tallahassee Gas and Electric Light Company, on December 20, 1887, and when it began operations under the Tallahassee City Ordinance of January 4th, 1888, but was omitted from the Revised Statutes and ceased to be law on the 13th of June, 1892, the day the Revised Statutes became operative.

The *purposes of the creation* of the Tallahassee Gas and Electric Light Company was, as stated in the bill of complaint, to construct, maintain and operate gas works and electric light works in said city and to manufacture gas for light and fuel, or to dispose of and deal in coal or wood for fuel, and to maintain and operate electric light machinery for

supplying light in said city, or for manufacturing and dealing in any and all manner of artificial light or heat within the city.

At the same session (A. D. 1868) of the Legislature at which the above mentioned statute was enacted there was passed: "An Act to provide for the incorporation of Cities and Towns and to establish a Uniform System of Municipal Government in this State," the date of its approval being August 6, 1868, and it being Chapter 1638 of the Laws of Florida. It provided, *inter alia*, for the exercise of its system of government by existing municipalities, and repealed the charters of all that should not accept its provisions within six months. The 15th section of this statute provides: "That the City or Town Council shall have power * * * to provide for the lighting of the streets of the city or town." This act was revised at the next session of the Legislature in 1869, by an act of the same title, approved February 4th, 1869, being Chapter 1688, and the stated provision was retained in the 15th section thereof, and no change was made as to such powers, nor was any other change made in the section. The 21st section, on page 249 of McClellan's Digest, and Section 693 of the Florida Revised Statutes are the same as said section 15, in said acts of 1868 and 1869.

The stated municipal act of August 6th, 1868 (Chapter 1638), gave the city or town council (section 12) power to "regulate, improve, alter, extend and open streets, lanes and avenues, and to cause encroachments and obstructions, decayed buildings and ruins to be removed," and provided for compensation to parties injured and assessments against those benefited. The same provisions are contained in section 12 of the above act of February 4th, 1869 (Chapter 1688), and likewise in the amendment of said section 12 of the act of 1869 made by section 2 of Chapter 3024, approved March 8th, 1877, and to be found in McClellan's Digest as section 17 on page 248, and in our Revised Statutes as Section 675. The only change made in such section by the amendment of 1877 being the addition of the power to construct drains and sew-

ers. The same amending act changes the 13th section of said act of 1869 so as to make it provide that the City or Town Council shall have "power to regulate and control the grading, construction and repairs of all *streets*, pavements and sidewalks," and requires the owners of real estate within the corporate limits to construct uniform and substantial sidewalks around their several lots; but such section had, as it stood in the act of 1868, and that of 1869 contained such provisions except as to *streets*. It is to be found in McClellan's Digest, Sec. 19, p. 249, and has been retained in the Revised Statutes as Section 676.

Whatever exclusive privileges the statute first mentioned above, Chapter 1639, act of August 8, 1868, may have conferred upon the Tallahassee Gas and Electric Light Company, it can not, in view of the above provisions of the Municipal Incorporation Act passed at the same legislative session of 1868, as to the power of the City and Town Council to provide for the lighting of the streets, be held that power to light the streets of any city or town organized under such municipal legislation was intended to be given to any company that might be organized under Chapter 1639, and as the same power to make provision for lighting streets obtained in the council at the time of the incorporation of the Tallahassee Gas and Electric Light Company (December 20, 1887), no power to light the streets of Tallahassee, a city incorporated under the general municipal incorporation law of 1869, was conferred by the charter of such company. The City Council having the power to make provision for lighting its streets, the Legislature can not be held to have intended to give the power to any company that might be organized under said act of August 8, 1868. The stated provision in the municipal statute is a limitation upon the general provision of the other act. Acts passed at the same session of the Legislature should be so construed as to maintain the provisions of each, and no other construction than that contended for can give effect to the stated provision of the municipal acts.

Statutes which are *in pari materia* are to be construed

together and effect given to them, and contemporaneous legislation, not precisely *in pari materia* with any particular act to be construed, may be referred to on the question of intent.

23 Am. & Eng. Ency. of Law, Title "Statutes," pp. 311–315.
Fla., etc., R. Co. v. Pensacola, etc., R. Co., 10 Fla., 160.
Donovan, *Exparte*, 24 Fla., 281.
Ferari v. Board of Health, 24 Fla., 390.
U. S. v Freeman, 3 How., 556.
Beals v. Hale, 4 How., 37.
Huidekoper v. Douglass, 3 Cranch, 66.
Chicago, etc., R. Co. v. U. S., 127 U. S , 406.
Van & v. Newcombe, 132 U. S., 235.
Frost v. Wenie, 157 U. S., 46.
Smith v. People, 69 N. Y., 175.
In re. Rochester Water Comrs., 66 N. Y., 422.
Chase v. Lord, 77 N. Y., 18.

It will not be denied that the Legislature of 1863 was the first meeting of that body held under the Constitution of 1868 resulting from the Reconstruction Acts of the U. S Congress of 1867. That Legislature not only enacted a general law as to Municipal Corporations, Chapter 1638, *supra*, and one as to business corporations for profit, Chapters 1639, 1640, *supra*, but also one for the incorporation of Benevolent and Charitable Societies, Chapter 1641, approved August 6, 1868. This legislation was at least somewhat of a departure from old methods, and the institution of a system of general and uniform laws as to corporations, in response to the requirements of the Constitution of 1868. These statutes must be considered together in order to ascertain the intent of the Legislature as to the powers and functions of the respective bodies, or corporate entities, provided for by them severally. They were all before the same Legislature, and at the same time, and it is unreasonable to assume that each was not considered in its bearing upon the other, and as constituting a distinct part of a general system; and when there is an express and special provision in any one of them as to particular powers or functions of the class of corporations it provides for,

any mere general provision to be found in any other statute as to its class must naturally give way as subordinate to such special intent of the Legislature. Especially must this be the case where the special provision concerns a public function and duty, such as lighting the streets of a city, or the control and management of such streets. Upon the authorities cited above, it can not be held that the Legislature intended that any business corporations to be organized under Chapters 1639, 1640, should have any power to light the streets of any town or city of Florida, incorporated under such municipal statutes (as was Tallahassee), except by authority received from such city or town. Again Chapters 1639, 1640 conferred no power upon the city or town; and Chapter 1638 conferred no power on any city or town to grant to any person, whether natural or artificial, any exclusive right to light the streets.

It is also true that the power shown above to be given by such municipal statute to cities and towns as to their streets precludes the contention that the act of August 8th, 1868, Chapter 1639, gave the Tallahassee Gas and Electric Light Company any right to use the streets of the city of Tallahassee for either gas or electric or any other purposes specified in its charter. To say that it did is to say that the stated provisions of the municipal act giving the city and town council power to regulate the streets were of no effect. In view of the nature and purposes of streets, and the statutory provisions referred to above and the authorities cited in the second succeeding paragraph below it is obvious that the exclusive control of the streets was given by the municipal statute to cities and towns as against business corporations, yet that the power of control vested in cities and towns did not extend to the limit of authorizing municipalities to grant to any one any exclusive privilege as to the use of the streets for any purpose.

The policy of the law was to vest in the city or town government, not in a business corporation, or other agency, the power to provide for lighting the streets, and that of regulating the use of streets for any and all purposes; the municipal

corporation statutes of 1868, and 1869, and 1877, *supra*, invested the municipalities with such powers, and the business corporation acts, *supra*, did not vest business corporations with such powers; nor was any joint power given to the two classes of corporations whereby the power or function of the business corporation in the premises was increased.

I do not feel justified in saying that the Plaintiff in Error contends that the City Council of Tallahassee had, under the municipal statutes in operation at the time of the passage and approval of the ordinance of January 4th, 1888, any power to grant to or create in the Tallahassee Gas and Electric Light Company *exclusive* authority to construct gas and electric light works in the city, and for that purpose any of the exclusive incidental or auxiliary powers mentioned in the ordinance. It is evident both upon principle and authority that the municipal statute did not, either in providing for lighting the streets of the city or regulating the use of the streets, give any such authority to the city.

Dillon's Municipal Corporations (4th ed.), Secs. 89, 692, 693.

F. C. & P. R. R. Co. v. Ocala S. & S. R. Co., 39 Fla., 306.

Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep., 659.

Saginaw G. L. Co. v. City of Saginaw, 28 Fed. Rep., 529.

Syracuse Water Co. v. City of Syracuse, 116 N. Y., 167.

Minturn v. La Rue, 23 How., 435.

Wright v. Nagle, 101 U. S., 791.

Freeport Water Co. v. Freeport City, 180 U. S., 587.

Danville Water Co. v. Danville, Id., 619.

Rogers Park Water Co. v. Fergus, Id., 624.

Detroit Citizens Street Ry. Co. v. Detroit Railway, 171 U. S., 48.

State *ex rel.* v. Cincinnati G. L. & C. Co., 18 Ohio St., 262.

Gas Co. v. Parkersbury, 30 W. Va., 435.

Birmingham, &c., St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala., 465.
Gale v. Kalamazoo, 23 Mich., 344.
City of Newport v. Newport Light Co., 89 Ky., 454.

A power to provide for lighting the streets of a city does not confer power to authorize the manufacture and sale of either gas or electricity by others for the private use of the inhabitants of the city, and conceding that the general welfare clause, giving power "to do and perform all such act or acts as shall seem necessary and best adapted to the improvement and general interest of the city or town," to be found in section 15 of the municipal act of 1868, and section 15 of the act of 1869, and in section 21, page 249 of McClellan's Digest, and continued in the Revised Statutes, section 693, gave to the city such authority, it is nevertheless obvious from the authorities last cited that it granted no power to confer an *exclusive* right or privilege on any one to carry on any such business.

In State *ex rel.* v. Jacksonville Street Ry. Co., 29 Fla., 590 (A. D. 1892), the Street Railway Company (a horse railway) claimed, and it was conceded by the court, that by virtue of its charter it had, under section 10 of the railroad incorporation act of February 19, 1874, the power to construct its road across, upon and along any street of the city of Jacksonville without regard to the action of the City Council of Jacksonville. Such section gave express authority to construct the road across, along or upon or use any street or highway. The stated municipal act of 1869, as amended March 8th, 1877, by sections 2 snd 3 of Chapter 3024, gave the city or town council power to regulate, improve, alter, extend and open streets, lanes and avenues, to cause encroachments and obstructions, decayed buildings and ruins to be removed, and to regulate and control the construction, grading and repairs of all streets, pavements and sidewalks within the city or town limits. In the opinion of the court it is held that authority of a general nature to regulate and control the streets

usually granted to municipal bodies is generally deemed sufficient to clothe the municipal body with the right to grant or refuse or otherwise to regulate the use of the streets for street railways operated by horse power, and it is further said: "The respondent company was incorporated after the passage of the act of 1877, *supra;* and if any conflict should exist between this act and the one of 1874, upon which the defence is based, the former would control; but we perceive no conflict between them as to street railways. Conceding that the respondent had the franchise right to construct the railroad, yet the manner in which it was to be done, and the amount of contribution to be made by it to the municipal body for the maintenance of the street, in consideration of the benefits thereby derived were left by the act of 1877 to the regulation of the municipal body. Under the decisions the general powers conferred upon municipal bodies by said act to regulate and control the construction, improvement and repair of streets are sufficient to authorize them to impose such conditions as are contained in that portion of the ordinance now under consideration, and hence we conclude that the respondent company is bound thereby."

In Fla. Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla., 306 (A. D. 1897), the Supreme Court of Florida, construing the powers of cities and towns in this State over their streets, held that legislation cited above, Section 17, on page 248 McClellan's Digest, did not authorize a city organized thereunder to vest in a street railway company an exclusive right to the use of its streets.

The consideration the last two decisions are entitled to and will receive at the hands of this court is not doubtful. Burgess v. Seligman, 107 U. S., 20, Freeport Water Co. v. Freeport, *supra.*

Under the legislation referred to above and controlling in this case, and the rule of law applicable thereto and evidenced by the authorities cited, the City Council of Tallahassee had no authority to exclude other persons from making or vending gas or using the streets of the city for that pur-

pose, or to preclude itself from lighting its streets through any other instrumentality than the Tallahassee Gas and Electric Light Company or its successors. It could place no such limitation on itself or succeeding councils of the city, and for the reason that the law-making power had not given it authority to do so.

Stein v. Bienville Water Supply Co., 141 U. S., 68.
Syracuse Water Co. v. City of Syracuse, 116 N. Y., 167.
Richmond County Gas Light Co. v. Town of Middleton, 59 N. Y., 228.
Davis v. Town of Harrison, 46 N. J. (Law), 79.

If it could be claimed that the defective power of the City of Tallahassee as to granting exclusive franchises in the premises is supplemented by the charter of the Tallahassee Gas and Electric Light Company in any way, or upon the theory that such Gas Company was by its charter capable of exercising such franchises if the city would consent thereto, it is, however, fatal to any such contention that there has never been any exclusive privilege for a period so short as twenty years mentioned in the 38th section of Chapter 1639 (Sec. 30, p. 234 McClellan's Digest). The limitation of twenty years in such section can not support a longer grant from the city and renders the municipal grant for twenty-five years void.

Davis v. Town of Harrison, *supra*.

Who can say, moreover, that the City of Tallahassee would have granted such alleged exclusive privileges on the terms stated in the municipal ordinance for only twenty years. It has not spoken for itself on the point.

The power granted to the Gas and Electric Company by the statute of 1868, Chapter 1639, did not confer any power on the municipality.

Louisville & Nashville R. Co. v. Kentucky, 161 U. S., 677, 691–2.
Detroit Citizens Street Ry. Co. v. Detroit Railway, 171 U. S., 48.

In view of the municipal legislation set out above the provision of Section 38 of Chapter 1689, *supra*, gave no more authority for the exercise within a municipality of any power as to anything covered by such municipal legislation, than it would if such municipal legislation had been incorporated by apt words into said section 38, as a proviso, as in the case of the Michigan legislation construed in the case last cited; and our legislation, both Chapter 1638 and 1639, gives no power to a city or town to grant any exclusive privileges as to any matter covered by the cited municipal legislation. 171 U. S., 48.

II.

It is obvious that while the Tallahassee City Ordinance of January 5th, 1888, does show (section 1) an intention to give authority to the Tallahassee Gas and Electric Light Company to construct gas and electric light works, and for that purpose to lay pipes in any and all streets and alleys and lots of the city and erect lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in the city and to make necessary excavations and structures and run wires along the streets, it is clear there was no purpose upon the part of the city to confer, by the ordinance, a corporate capacity of any kind upon such company. It can not be contended that the city had any power to confer any such capacity; nor was the acquisition thereof a purpose of the named company in obtaining the ordinance. The sole purpose was to obtain authority from the city, through its council, for the construction by such company of gas and electric light works in the city, and to use the streets, alleys and lots of the city for the purposes and in the manner therein and above stated. The conditions to such use, imposed by the ordinance, are: (Sec. 6) that the company shall not be permitted to manufacture and supply gas of less than eighteen candle power; nor to charge private consumers exceeding $2.50 per 1,000 feet, or the city more than $30.00 for each lamp of not less than twenty candle power through burners of a capacity of four feet per hour; that (Sec. 7) the company

should file its written acceptance of the ordinance within thirty days after its taking effect, upon the filing of which acceptance the terms of the ordinance were to become binding on the city and the company. The ordinance also provides (Sec. 7) that the company shall put in and operate electric lights as soon as sufficient consumers can be secured to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights. In other sections there are provisions that in case of any violation of the ordinance by the company the City Council may in its discretion declare the ordinance null and void and repeal the same, and for a lease of a part of a piece of land lying south of the city, and known as the City Reserve, at a nominal rental, and regulations as to construction of works not necessary to notice, and then the ordinance provides (section 10) that the city "in consideration of the foregoing requirements being complied with on the part of" said company "their associates, successors and assigns shall and hereby obligates itself to take all gas which it may wish to use in lighting its streets or buildings at a price of not more than $1.50 per 1,000 feet for such as may be used in public buildings used exclusively by said city, and at a price of not more than $30.00 per annum for each street lamp as herein provided for in section 6 of this ordinance for the period of *twenty-five consecutive years from the completion of said gas works. Provided that nothing herein shall be construed as an obligation on the part of said City of Tallahassee to take any gas from said company.*" Section 11 ordains: "That the *privileges and licenses* herein and hereby granted shall be *exclusive* in and to said Tallahassee Gas and Electric Light Company, their associates, successors and assigns for and during the term of twenty-five years."

The proviso to section 10 as to not taking any gas, considered in connection with the fact of an entire absence from the ordinance of any agreement upon the part of the city to take any electric light from the company, shows that there

was no intention upon the part of the city to exclude itself from the right to supply itself through its own instrumentalities with electric light, and that it was not bound by the ordinance to refrain from doing so. This construction is in accordance with the general rule applicable to such cases, and supported by authorities, *supra*, and particularly by the cases of

Lehigh Water Company's Appeal, 102 Penn. St., 515.
Saginaw Gas Light Co. v. City of Saginaw, *supra*.
Gas Company v. Parkersburg, *supra*.
Stein v. Bienville Water Supply Co., *supra*.
City of Newport v. Newport Light Co., *supra*.

The city had no power to create any exclusive franchise as to any "*privileges*" or "*licenses*," and we find, moreover, from the ordinance itself, that the city has expressly exempted itself from any obligation to take gas and has not agreed either to take electricity from the grantee or not to use electricity, and it is consequently clear that the complainant can have no right to an injunction to restrain the city from erecting an electric plant, or using electricity supplied by itself or from other sources, and this is true independent of the legislation of 1897 and 1899 commented upon hereafter. *Vide* authorities last cited, *supra*. The city not having agreed to take any gas from the grantee company or its successors and assigns, and not having agreed to take any electricity from them, and not having agreed not to use electricity for lighting purposes, can not be held to have intended or been understood to part with its rights and duty to light the streets, and to do all things necessary therefor. The power to light the streets carried with it the choice of means to accomplish that end. Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla., 271.

And again there is in the ordinance no contract or agreement that the Tallahassee Gas and Electric Light Company should have the exclusive right to supply the inhabitants of, or private consumers in, the City of Tallahassee with either gas

or electircity, or that such inhabitants or consumers should take gas only from such company or its successors or assigns, and not from any other company or agency that might manufacture it either within or without the city; and there is no agreement that no other company or agency should sell gas to private consumers in the city or electricity to either the city for public purposes or to private consumers. The regulation as to candle power of gas, and maximum prices to be charged do not constitute restrictions upon the rights of either manufacturers, or of purchasers or consumers. There being an absence of all these agreements and guarantees (none of which the city had any authority to make), and the city having exempted itself from any obligation to take any gas, and not having agreed to take any electricity for its own use, and not having agreed not to use electric light, and it having no authority to grant the exclusive use of its streets, alleys or lots for the purposes of constructing gas or electric light works, or for any of the incidental purposes mentioned in the ordinance, there is, consequently, nothing in the ordinance that is an obstacle to the supplying either itself or other consumers with electricity under the legislation of 1897 and 1899 and the ordinance of 1899, adopted pursuant to such legislation. If there is, then the city has debarred itself from using during the period of twenty-five years either gas or electricity not furnished by the named company or its successors, without having so agreed, and without having any authority to give any exclusive license or privilege it has attempted to give.

It seems then that the case at bar is not one in which the City of Tallahassee has agreed that it would not become a competitor with the Tallahassee Gas and Electric Light Company, and it is clearly distinguishable from that of Walla Walla City v. Walla Walla Water Co., 172 U. S., 1, cited by plaintiff in error. In that case there was an express agreement that the city would not erect, maintain or become interested in any waterworks, but the city reserved the right to

condemn and pay for the water rights and works of the company or of any company at any time (pp. 5. 17–18). This agreement was held to be within the power granted to the city by its charter to provide a sufficient supply of water and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a term not exceeding twenty years; and not to violate the *proviso* that none of the rights or privileges granted should be exclusive or prevent the council from granting such rights to others (pp. 14, 17, 18). It is, however, said in the opinion (p. 14) that had the privilege granted by the ordinance been an exclusive one the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the Legislature to that effect. In the case at bar while there is no authority whatever in the city charter to grant any exclusive privileges, the ordinance has undertaken to grant some, but the city authorities, either by accident or design, have effectively excepted the city from them; and in the Walla Walla case, while there is an express negation of any authority to grant any exclusive rights the city expressly debarred itself from becoming interested in any waterworks except after having exercised the power of eminent domain against such company as to its water rights and works.

III.

Such being the status and rights of the Tallahassee Gas and Electric Light Company, we are brought to a construction of the rights of the Capital City Light and Fuel Company, the Plaintiff in Error claiming, through W. A. Rawls, who purchased on the 5th day of February, 1894, under a decree of foreclosure and sale rendered January 4th, 1894, in a suit in equity wherein Wm. M. McIntosh, Jr., as trustee, was complainant, and the Tallahassee Gas and Electric Light Company was defendant, in the Circuit Court of the Second Judicial Circuit of Florida in and for Leon county. The allegations of the bill of complaint are that by virtue of a decree

of foreclosure and sale made on said 4th day of January, "all lands belonging to said Tallahassee Gas and Electric Light Company, with the tenements, hereditaments and appurtenances thereon and thereunto belonging, or in anywise appertaining, and also the plant, machinery and attachments thereto, whether movable or immovable, or whether pertaining to the realty or personality, and the corporate franchise of said oompany, and all claims of property, real, personal and mixed, of said company then owned by it," were offered for sale to the highest bidder on said 5th day of February, and on being so offered were bought by said Rawls, and a deed was made to him therefor by the Master in Chancery in said cause; and that thereafter on March 19th, 1894, the Capital City Light and Fuel Company, was duly incorporated under the general incorporation laws of the State of Florida. The "general nature of the business to be conducted" by such corporation is stated in the bill to be ("as expressed in its articles of association") "to acquire, construct, improve, maintain gas works and electric light works *in and adjacent to* the City of Tallahassee, in Leon county, State of Florida; and to manufacture gas for light and fuel, to dispose of and deal in coal or wood for fuel; to construct, maintain and operate electric light machinery for supplying light in and about such city, or for manufacturing and dealing in any and all manner of artificial light or heat."

It is also stated in the bill that such company was incorporated with the purpose and intent of acquiring and operating under the terms and provisions of said ordinance of the City of Tallahassee, the said property so purchased by the said Rawls under the decree aforesaid, and said property was purchased by Rawls with the intent and purpose of transferring it to said company for such purposes, and that in performance of such intent and purpose the said property was made over by him to said company and the company at once entered into possession and assumed the management and control thereof and continued the manufacture of gas for pur-

poses of supplying said city and its inhabitants with light and heat, and has since coming into possession thereof enlarged and extended its plant to meet the increased demands of said city and its inhabitants, and the city has ever since recognized, treated and dealt with the Plaintiff in Error as the lawful successor of said Tallahassee Gas and Electric Light Company, and the legal assignee of all the rights and franchises, privileges and contracts created and conferred on said last named company by said ordinance of the City of Tallahassee.

There are two aspects in which the rights of the Capital City Light and Fuel Company, the Plaintiff in Error, are to be considered.

The first is what are its rights and powers in the premises by virtue of its articles of incorporation, or charter of March 19th, 1894.

As stated at the outset of this brief, the 38th section of the act of August 8th, 1868, Chapter 1639 (Sec. 30, p. 234 McClellan's Digest) was not retained in the Revised Statutes, but ceased to be operative upon such Revision becoming effective on June 13, 1892, which was nearly two years before the incorporation of the Plaintiff in Error, and over eighteen months before the decree of sale, and over nineteen months before the sale to Rawls. By section 1652 of the Revised Statutes it is provided that "whenever the use of any street, square or public way, or any part thereof, within an incorporated city or town or provisional municipality is required by any corporation for public use the right to use such street, square or public way, or any part thereof, shall be granted only by the Mayor and Board of Aldermen of such city or town or by the commissioners of such provisional municipality." In the light of authorities, *supra*, this confers no power to create or grant any exclusive rights or privileges. Moreover, on the 2d of June, A. D. 1893, some months prior to such decree, sale and incorporation, there was passed an act, Chapter 4166, which took effect sixty days after the day of adjournment of the Legislature (such adjournment being on June 2d,

1893), authorizing the Council of any city or town to enter into an agreement with gas and electric light or waterworks companies for lighting the streets or constructing and operating waterworks in such city or town, such act having a *proviso* that any such agreement must be ratified by a majority vote of the freeholders voting at an election to be held for that purpose, and an additional *proviso* not necessary to mention here. See also Section 680, Revised Statutes of Florida, reproduced from an act of March 11th, 1879.

By the stated repeal of such 38th section there was an entire elimination of ever ground for any pretence of an exclusive privilege attaching as a corporate franchise to the Capital City Light and Fuel Company by virtue of its corporate being, or to any other business corporation organized subsequent to such repeal under the laws of Florida, and this, too, independent of the alleged effect of the municipal corporation statutes cited above; and the Capital City Light and Fuel Company having been organized subsequent to said act of June 2d, 1893 (Chapter 4166), there could be no binding contract between it and the City of Tallahassee for lighting the streets, or for constructing and operating water works in the city in the absence of a compliance with the terms of Chapter 4166. After Chapter 4166 went into effect, which it did on August 1st, 1893 (the Constitution of Florida, Sec. 18 of Art. III, providing that no law shall take effect until sixty days from the final adjournment of the session of the Legislature at which it was enacted unless otherwise specially provided in the law, and that session having adjourned on June 2, 1893), there was no power in any town or city in Florida to enter into any binding contract of the character stated without a ratification thereof by a majority vote of the freeholders. In a word, it is safe to assert that the appellant company had no exclusive rights or powers in the premises by virtue of its charter of March 19th, 1894.

The second aspect in which the appellant company's rights and powers in the premises are to be considered is as the assignee of Rawls.

The proposition as put by counsel for Plaintiff in Error is: Did the franchise of the Tallahassee Gas and Electric Light Company to operate gas and electric light works in the City of Tallahassee and the exclusive right to this privilege pass under the foreclosure sale to Rawls, and from him to the Capital City Light and Fuel Company, under his deed of transfer or assignment?

It is not contended on behalf of Plaintiff in Error that the sale to Rawls vested him with the franchise of being a corporation, or with the name and the essentials to the entity of the Tallahassee Gas and Electric Light Company. Rawls did not either become a corporation, or become vested by the sale with the general corporate powers of the old company. Thompson on Corporations, Secs. 5352-5355, 5368, 5370, 5373, 5374. The contention is that the right to lay and keep its pipes in the streets of the city and all the company's property and the right incident to the property to use it for the purposes for which it was designed and adopted, and the exclusiveness of such right, passed to Rawls and from Rawls to the Plaintiff in Error.

Before dealing with this contention it is well to state exactly what property, as shown by the pleadings, did pass to Rawls, and from him to the Plaintiff in Error. The bill of complaint (pages 3 and 4 of the transcript) says: That the "Tallahassee Gas and Electric Light Company *constructed its gas works* under and in conformity to the terms and provisions of its charter and the ordinance aforesaid, and began and continued the operation of the same by virtue and in pursuance thereof, and exercised * * all and singular the powers, rights, privileges, licenses and franchises granted to or conferred upon said company by the law of its incorporation and the ordinance of the City of Tallahassee aforesaid, including the contract for lighting the streets and buildings of said city at the price and on the terms provided, until about November 8th, A. D. 1893, when all and singular *the gas works, plant and property of every kind and character of said company* were taken possession of by a receiver" appointed by

the proper Circuit Court of the State in a named cause;" and "by virtue of a decree of foreclosure and sale made" therein on the 4th day of January, 1894, "*all lands belonging to the said Tallahassee Gas and Electric Light Company, with the tenements, hereditaments and appurtenances thereon, and thereunto belonging or in anywise pertaining, and also the plant, machinery and attachments thereto, whether movable or immovable, or whether pertaining to the realty or the personalty and the corporate franchise of said company, and all classes of property,* real, personal and mixed of *said company then owned by it were offered for* sale on the 5th day of February, A. D. 1894," and on being so offered were bought by and conveyed to said Rawls, who subsequently made over the same to the Plaintiff in Error, which had, in the *interim*, on March 19th, 1894, been incorporated under the laws of Florida, for the purposes above indicated; said property having been purchased by Rawls with the intent and purpose of transferring it to Plaintiff in Error, which had been incorporated with the purpose and intent of acquiring and operating such property under the terms and provisions of said ordinance.

From the above statement, it can not be inferred that the Tallahassee Gas and Electric Light Company had constructed anything but *gas works* prior to either the seizure or sale mentioned; or that anything but a gas plant was seized or sold. The allegation of the bill (p. 8 of Transcript) that "there has never been a time since the establishment of said gas works in said city that your orator or its predecessor could have procurred sufficient customers to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and put into practical operation an electric lighting system in said city," considered in connection with the next preceding and next succeeding paragraphs of the bill, and with the 7th section of the ordinance (page 12 of Transcript) precludes the assumption that there was any electric plant in existence either at the making of the mortgage or the time of the sale to Rawls. If there was ever any "con-

tract for lighting the streets and buildings of said city" even with gas entered into between the city and either company the terms and duration of the same are not shown; and it is obvious that the ordinance does not of itself constitute a contract between the city and even the old company for taking any gas, its only purpose being to regulate certain features of any contract the city and company might subsequently agree to, *viz:* quality of gas, maximum charge, etc. Such being the case, the only property acquired by Rawls and transferred by him to the Plaintiff in Error was such gas plant as the Tallahassee Gas and Electric Light Company may have had at the time of such seizure and sale, including any real estate constituting a part of the same. As the assignee of Rawls the Plaintiff in Error took the stated property and none other. It purchased no electric light plant, there being none sold, and the old company never having had any to be seized or sold.

The Tallahassee Gas and Electric Light Company had no power to mortgage its corporate franchises, but, as is, in effect, admitted on page 20 of brief of counsel for Plaintiff in Error, power to "mortgage" only "such real and personal estate as the purposes of the corporation shall require not exceeding the amount limited in its articles of incorporation." Such is the language of the law under which it was formed. Sec. 3, p. 228 McClellan's Digest. Its articles of incorporation (pp. 10-11 of Transcript) provided that it should "hold, * * mortgage, and otherwise dispose of all realty and personalty as may be necessary for the purposes hereinafter explained."

Any mortgage, or any decree of foreclosure and sale, that included "the corporate franchises of the company," and any pretended sale of any such franchises, if there ever was any, were severally illegal and void.

Thompson on Corporations, Secs. 5352, 5353.
Morawetz on Corporations, Sec. 932.
Butler v. Rahm, 46 Md., 541.
Feitsam v. Hay, 122 Ill., 293.
Pullam v. C. & C. A. L. R. Co., 4 Biss., 35.

The only franchise that passed to Rawls or from Rawls to the new company, the Plaintiff in Error, was the right and power to apply the gas plant property, purchased and conveyed, to the uses for which it was intended and adapted and thereby make it productive and beneficial to the owner; the right and power necessary to the maintenance and operation or use and the beneficial enjoyment of the property.

Morawetz on Corporations, Sec. 932.
Thompson on Corporations, Secs. 5354, 6236.
Morgan v. Louisiana, 93 U.S. 217, 223.
Memphis R. Co. v. Commissioners, 112 U. S., 609, 619.
New Orleans, etc., R. Co. v. Delamore, 114. U. S., 501.
Eldridge v. Smith, 34 Vt., 484, 490, 491.
Atkinson v. Marietta, etc., R. Co., 15 O. St., 21, 36.
Wright v. Milwaukee & S. P. Ry. Co., 25 Wis., 46.
City of Menosha v. Milwaukee & N. R. R. Co., 52 Wis., 414.
Meyer v. Johnson, 53 Ala , 237.

Rawls did not purchase or convey any other than gas plant property; he obtained no electric plant property, and no franchise as to any electric plant property.

Again, there was no obligation incurred by Rawls to carry out the undertaking of the Tallahassee Gas and Electric Light Company under the 7th section of the ordinance (p. 12 of Transcript) to put in and operate an electric light plant. This obligation is confined by its terms to the last named company, and is also personal in its character, and did not run with or attach as a lien or burden upon the property of the company, and would not have bound Rawls, or other such purchaser at a foreclosure sale, or his assigns, had the stated section by its terms made the obligation binding upon the "successors and assigns" of the original company.

Wright v. Milwaukee, etc., R. Co., *supra*.
City of Menosha v. Milwaukee & N. R. R. Co., *supra*.
People *ex rel.* v. Louisville & Nashville Ry. Co., 120 Ill., 48; S. C., 10 N. E. Rep., 657; S. C., 5 N. E., 379.

The foreclosure sale did not dissolve or destroy the Tallahassee Gas and Electric Light Company. Thompson on Corporations, Sec. 5370. This being the fact, and the status of the property of that company at the time of the sale being as above indicated, and Rawls having taken no electric plant property nor any franchise except that of the beneficial use of the gas plant property which he purchased, it follows that if there is any franchise as to an electric light plant under Section 38 of Chapter 1639 anywhere, it remains in the Tallahassee Gas and Electric Light Company.

The allegations of the bill as to the status of the property of the old company at the time of the foreclosure and sale, are not sufficient to sustain conclusions any more favorable to Plaintiff in Error than have been reached under this subdivision of this brief, and the court will on demurrer to the bill take judicial notice of the legislation which we have invoked. Louisville & Nashville Railroad Company v. Palmes, 109 U. S., 244.

The Capital City Light and Fuel Company having been organized after the repeal of Section 38 of Chapter 1639, and under a system of laws which does not pretend to give or permit the giving of any such exclusive franchises, it has no exclusive franchises of the character claimed, and could not acquire any from any source other than the Legistature.

Trask v. Maguire, 18 Wall., 391.
St. Louis, &c., Ry. Co. v. Berry, 113 U. S., 465.

Chapter 4052 of the acts of 1891, invoked by Plaintiff in Error, does not seem to call for further comment than that it is not susceptible of a construction giving it a purpose to increase the powers of any municipality as to granting a right or franchise to use streets, but on the contrary the act is entirely remedial of abuses by any gas, electric light and other companies of any such grant, as shown by its context and its titles; such title being: "*An Act providing for the forfeiture of franchises, grants, rights, privileges, licenses and immunities in certain cases.*" The act provides for taking away, and not for granting franchises, etc.; and in view of

its title and of section 16 of Art. III of the Constitution of Florida which provides that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, *which subject shall be briefly expressed in its title*," any provision of the latter or granting character would be void. State *ex rel.* v. Palmes, 23 Fla., 610.

IV.

The Supreme Court of Florida in the case at bar (pp. 27–35 Transcript, 28 South. Rep., 810) has held that the municipal statutes cited above do not authorize a city to grant an exclusive privilege for the use of streets for supplying gas or electricity to the city or its inhabitants by corporations authorized to manufacture gas or electricity; and that Section 38 of Chapter 1639, the business corporation act (Section 30, p. 234, McClellan's Digest) did not confer any power on cities or towns, or supplement the powers conferred by the municipal legislation referred to. The court also holds that the exclusive privileges granted by said section 38 did not attach to a corporation organized under Chapter 1639, until the corporation had been put into successful operation, and that where a company incorporated under such chapter was organized, as shown by its charter, to engage in more than one kind of business, the fact that it erected a plant and engaged in one of the kinds of business did not vest it with exclusive privileges as to the other kind, in which it never engaged, so as to preclude the Legislature from authorizing another, municipal or private, corporation to engage in the latter kind of business; and as sustaining this conclusion, upon the authorities cited by the court, it is opportune to refer at this juncture to the statement which has just been made, under the next preceding subdivision of this brief, of the status of the property or plant of the Tallahassee Gas and Electric Light Company, as shown by the bill of complaint in this cause, at the time of the filing of the bill of foreclosure and of the sale to Rawls.

V.

As has been shown above, the 38th section of Chapter 1639 expressly declares, by a proviso, as a limitation upon its exclusive privilege feature, that "this investment shall not so operate as to divest any future Legislature of those powers of government which are inherent and essential attributes of sovereignty, to-wit: The power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like."

We are unable to see that freedom of legislation as to lighting municipalities and as to the use of streets for such purposes are not severally as inherent and essential attributes of sovereignty as anything specified in the above "proviso," or that they are not included in "the like" classification, or that the specification as to providing "safe and convenient ways for the public necessity and convenience" does not incidently include the control of streets for any and all purposes, whether it be as to their use for lighting a municipality or otherwise; but however this may be the statutes of 1897 and 1899 (Chapter 4600, approved June 5, 1897, and Chapter 4875, approved May 27, 1899) are in view of the *eminent domain features of* the said act of 1897 clearly within the reservation of such proviso as to taking "private property for the public use."

The city ordinance being without authority and of no effect in so far as the granting of any exclusive privilege to establish an electric plant or furnish the inhabitants of Tallahassee with electric light, it did not limit the power of the Legislature to lawfully enact the stated statutes of 1897 and 1899, and upon the enactment of the statutes of 1897 and 1899 the policy and provisions of such statutes became available to the city of Tallahassee if it should see fit to use them, which, as shown by the bill, it is now proceeding to do. In acting under such statutes the city is simply following the law governing such cases and the unauthorized exclusive privilege

feature of the ordinance of the City of Tallahassee of January 5, 1888, is no obstacle (even if it would be if valid) to the enforcement of such statutes. That such legislation makes full provision for the compensation of all parties claiming to have an electric plant, or a gas plant where one of the same kind is sought to be established by a municipality, is shown by sections 9, 10, 11, Chapter 4600, and section 1 *et seq.* of Chapter 4875. The Plaintiff in Error has not invoked the protection of the provisions of said Chapter 4600 as to the valuation and compensation of and for any electric plant properties, but, on the contrary, has, by the course it has pursued in protesting against and in resisting in the courts the establishment of an electric plant by the City of Tallahassee under such legislation of 1897 and 1899, elected not to sell, nor to take any conpensation for, any electric plant, if it has any; and, without ever pretending that it has any electric plant, has chosen to rely upon what it deems its exclusive right to establish an electric plant within and vend electric light to the inhabitants of said city, and the invalidity of any claim upon the part of the city of the right to establish such a plant or to vend such light under said statutes of 1897 and 1899.

Section 9 of Chapter 4600, to be found on pages 34 and 35 of the brief of Plaintiff in Error, shows the rules of valuation prescribed by such statute for the valuation of any plant to be taken thereunder, and section 10, on pages 35 and 36 of said brief, and section 11, to be found at the end of this brief, show the procedure controlling where the owner of a plant is willing to sell his property and also that where such owner and the municipality can not agree as to what shall be sold or the terms of sale; and so much of Chapter 4875 as is material to this case is to be found at the end of this brief.

As in the absence of an exclusive contract right in the Plaintiff in Error to establish and maintain an electric plant and vend electric light, the fact of an exclusive contract right in it to establish and maintain gas works and vend gas is not a bar to the grant to or the exercise by another of the right to

establish and maintain an electric plant, and vend electric light (as shown by authorities, *supra*); so it must be true that the mere impairment or destruction of the value of a gas franchise or business through the competition resulting from the establishment of an electric light plant and business, would be no obstacle to the grant or establishment of the latter business in the absence of a prior valid grant of an exclusive right to the latter or of a prior valid contract not to grant or establish an electric plant or business.

Charles River Bridge v. Warren Bridge, 11 Peters, 420.
Turnpike Co. v. State of Marvland, 3 Wall., 210.
Piscataqua Bridge v. New Hampshire Bridge, 7 N. H., 35.

The same principle sustains the legislation of 1897 and 1899 now relied on, and particularly where, as in the case at bar, it is not shown by the bill of complaint that any electric plant or business had ever been established at the time of the practical application or enforcement of such legislation, to say nothing of the necessity for the establishment of the same at the time of the foreclosure proceedings.

There is, morever, nothing in the bill that shows any deficiency, in the above legislation, of provision for adequate compensation to Plaintiff in Error for any properties or conditions incident to it. If it had possessed any electric plant and there was anything in the condition or situation of such plant that rendered the compensation provisions of such legislation indequate it was the duty of the complainant to have presented such facts in its bill. It is a conclusive presumption for all purposes of this hearing that complainant has submitted in its bill every fact it had to sustain its prayer or entitle it to relief. If such legislation is invalid it is because it is taking private property without the "just compensation" required by section 12 of the Bill of Rights of the Constitution of the State of Florida, but no statute will be adjudged

unconstitutional at the application of a party whose rights are not shown to be affected by its enforcement.

Cooley's Constitutional Limitations (6th ed.), 196.
Jones vs. Black, 48 Ala., 540.
Smith v. McCarthy, 56 Pa. St., 359.
County of Franklin v. State, 24 Fla., 55.

Special legislation, like Chapter 4875, is not contrary to our Constitution. State *ex rel.* v. County Commissioners, 24 Fla., 483, construing Section 8 of Art. 8 of Florida Constitution.

VI.

As no other relief than an injunction is prayed by the bill, and the bill does not make out a case entitling complainant to any relief, a dismissal of the bill was proper practice.

Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla., 229.

In conclusion, it is respectfully submitted that there is no error in the decree of the Supreme Court of Florida, affirming that of the Circuit Court dismissing the complainant's bill.

GEO. P. RANEY,
Counsel for Defendant in Error.

Parts of Statutes Material to the Decision of this Case.

Section 693 of Revised Statutes of Florida:

693. Wharves, vessels, bridges, ferries, fires, improvements.—The city or town council shall have power to construct wharves, quays and docks; * * * *to provide for the lighting of streets of the city or town;* to inclose and improve such public squares or parks as may adorn the city or town and to improve and beautify the public cemetery for the burial of the dead, *and to do and perform all such other act or acts as shall seem necessary and best adapted to the improvement and general interest of the city or town.*

Section 675 of Revised Statutes of Florida.

675. Powers as to streets, sewers, ruins, etc.—The city or town council shall have power to regulate, improve, alter, extend and open streets, lanes and avenues, to cause encroachments and obstructions, decayed buildings and ruins to be removed; to construct drains and sewers, and make to the parties injured thereby such reasonable compensation, and charge upon those benefited such reasonable assessments as may be agreed upon by said council and the said party or parties; and in case no such agreement can be made, then the council shall appoint five discreet persons, holders of real estate in said city or town, to ascertain and fix on the one hand a fair and equitable assessment, and on the other a just compensation, and that the said assessment shall be a lien on the real estate improved and assessed, and that every person who enters his particular drain into the main drain, or common sewer, and receives a benefit thereby from draining his land, shall pay to the city or town his proportional part of making or repairing the same.

This section is also referred to on page 9 of this brief as section 2 of Chapter 3024.

Section 676 of Revised Statutes of Florida:

676. Streets, pavements and sidewalks.—The city or town council shall have power to regulate and control the grading, construction and repairs of all streets, pavements and sidewalks, and to require the owners of real estate within the corporate limits to construct uniform and substantial sidewalks around their several lots, and to keep the same in repair; and upon failure to do the same within the time and manner prescribed, the said council may have the same done, which shall be a lien against said lots, which lien may be enforced in the manner provided in section 691.

This section is also referred to on page 9 of this brief as section 3 of Chapter 3024.

Section 680 of Revised Statutes of Florida:

680. Parks, streets, etc.—The city or town council is further authorized and empowered to lay off such parks, streets, avenues, lanes, highways, canals, etc., as may seem necessary and expedient for the public health or interest; and to open, fill in, grade, pave, dig, dredge, widen, deepen and otherwise extend, enlarge, change and improve the same. And said city or town council shall have power and authority to alter, widen, fill in, grade, pave, or discontinue any park, street, avenue, alley, highway or any other way which has heretofore been laid out, fixed or established.

Chapter 4600, approved June 5th, 1897, is, in so far as it is material to this cause, printed at the conclusion of the brief of Plaintiff in Error, except section 11, which is as follows:

SEC. 11. Any party aggrieved by the award or verdict of the commission or jury may within fourteen days after its filing or within such longer time as the court may allow, file objections thereto with the clerk of said court and apply to the court for a hearing on such award or verdict relative to any matter of fact or law pertaining to the same, and thereupon the court shall make and render its final judgment in th premises after due notice to all parties in interest and an opportunity given to be heard in the premises. The judgment

of the court upon said award or verdict shall be final and binding, and said court shall have jurisdiction as in equity to compel compliance therewith, and may also issue and enforce such interlocutory decrees and orders as justice may require. Any party aggrieved by the final judgment of the Circuit Court may have a writ of error as in common law cases to the Supreme Court of the State, subject to all the rules and laws in force in this State relating to writs of error.

Sections 1, 2 and 3 of Chapter 4875, approved May 27, 1899, are the only parts of such Chapter material to this case, and are as follows:

CHAPTER 4875.

SECTION 1. That the City of Tallahassee, in this State, may, under the limitations provided in said Chapter 4600 of the Laws of Florida, approved June 5, 1897, above stated, exercise the powers provided for in said act in the manner set forth in said act, except that where the provisions hereinafter set forth are inconsistent with those provided in said act, then the provisions of this act shall control.

SEC. 2. That said City of Tallahassee may at any regular meeting of its City Council, or at a special meeting duly called for such purpose, pass a resolution declaring that it is expedient for such city to exercise the authority or any authority granted by section 1 of said act, approved June 5, A. D. 1897, but a vote of a majority of such Council shall be necessary to pass such resolution, and such resolution shall receive the approval of the Mayor, or in case of his disapproving the same it shall be passed over his veto by a two thirds vote of the Council. Such resolution shall provide for the submission to the registered voters of the city, residing therein and who own real estate therein and have paid their taxes for the year last due thereon, the question of the ratification of such resolution at a regular election or at a special election to be called and held for that purpose; and a majority of the votes cast at such election shall be necessary to such ratification; such election to be called and held and the electors registered and returns

thereof made in the manner hereinafter provided for in case of an election upon the question of the issue of bonds. When the result of such election is against such ratification, no similar resolution shall be submitted for ratification until after the expiration of one year thereafter. A majority vote in favor of such ratification shall establish the right of the city to exercise the power to construct, purchase, lease and establish and maintain within its limits, one or more plants for the manufacture and distribution of gas and electricity, or either, for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, as provided in Section 1 of said Chapter 4600 of the Laws of Florida.

SEC. 3. If said City of Tallahassee shall vote to construct or purchase or lease, and to establish and maintain within its limits any such plant as above provided for, or for reconstructing and enlarging the same, as provided in the fifth section of said act, approved June 5, A. D. 1897, it may pay for the same by the issue of bonds of the city payable within a term of not exceeding thirty years, and bearing interest at a rate not to exceed 5 per cent. per annum. Such bonds shall not be disposed of for less than par and accrued interest; and the indebtedness thereby created shall not be included in the limit of indebtedness of the said city now provided by law; but such bonds shall not be issued until an ordinance authorizing their issue shall have been adopted by the City or Town Council at a regular meeting or at a special meeting called for such purpose, which ordinance shall specify the purpose for which such bonds are to be issued, and the maximum amount of the issue, and the time of their maturity and the rate of interest, and when and where the same shall be made payable, nor until such ordinance shall have been ratified by a majority of the vote of the registered voters of such city, voting at an election to be called for the purpose of taking the sense of such voters on such question and possessing the property qualifications hereinbefore provided. The City Council shall provide for the registration of such voters by a registration to be

closed at least five days before such election, and for returns of election.

Before any election shall take place under this section, such ordinance shall be published once during each week for three consecutive weeks in a newspaper published in said city. And there shall be a similar notice giving the time and polling place of such election. The inspectors of the election shall be chosen by the City Council. The whole amount of bonds authorized to be issued shall not exceed at their par value the amount of seven per centum of the total valuation of real and personal property within the limits of said city according to the last preceding valuation of the same made by said city authorities.

The interest on said bonds, and the sinking fund to meet the principal of the bonds at maturity whenever such bonds may be called, shall be provided for by ordinance. If it shall be deemed expedient, the City Council may at the same meeting at which it shall have passed the resolution provided for in the second section of this act, or at a subsequent meeting, provide for submitting the question of the proposed issue of bonds to the voters having the qualifications prescribed by this act; and the election as to the ratification of such resolution and that for the ratification of the ordinance authorizing the issue of bonds may be held at the same time and place and under the same inspectors.

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No. 209.
Sup. Ct. of Raney & C.
Filed Mar. 26, 1902.

Office Supreme Court U. S.
FILED
MAR 26 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. ~~205~~ 209.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

SUPPLEMENT TO BRIEF.

GEO. P. RANEY,
Counsel for Defendant in Error.

Tallahassean Job Print, Tallahassee, Florida.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 505.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

Supplement to brief of Mr. George P. Raney, for Defendant in Error.

There are four cases cited by counsel for plaintiff in error, to which it is proper to give more special attention than I have given them in the principal brief for the defendant in error. They are Bailey v. City of Philadelphia, 39. L. R. A. 837; Illinois Trust & Savings Bank v. Arkansas City, 34 L. R. A. 518; Atlantic City Water Works v. Atlantic City, 39 N. J. Eq. 369; Southwest Mo. L. Co. v. City of Joplin. 101 Fed. Rep. 23.

In the case of Bailey v. City of Philadelphia, there was an express agreement upon the part of the city that it would "*do nothing by ordinanee or otherwise, which will in any way interfere with, or limit, restrict, or imperil, this exclusive right hereby vested in said United Gas Improvement Com-*

pany, its successors or assigns." It is said in the opinion: "All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to be exclusive so far as it is concerned shall be limited or interfered with. This was clearly within its power in dealing with its business property." As distinguishing this case and the one at bar it will be observed: That the grant in the case at bar was for the use of streets, for the purpose of gas and electric plants, which streets are beneficially the property and for the use of *all people* who may desire to use them, and was not the lease of a gas or other plant which was the property of the city in its private or business capacity: and there was no such non-interference covenant upon the part of the City of Tallahassee. It is a peculiar and distinguishing feature of the Tallahassee ordinance that there is not only no such *non-interference covenant*, nor any agreement to take either gas or electricity for city purposes, or that the inhabitants should take either for their own use, but there is an express proviso that the city should not be understood as agreeing to take any gas at all if it did not desire to use gas. It was the purpose of the city authorities to limit the right of the Tallahassee Gas and Electric Light Company, in so far as the vending of either gas or electricity was concerned, to an implied or incidental right of sale subject to competition from any and all sources. The city not only did not attempt to bind its inhabitants to take either gas or electricity from the last named company, its successors or assigns, but it had no power to so bind its inhabitants.

In Illinois Trust and Savings Bank v. Arkansas City the questions were simply whether or not an invalid exclusive feature of a grant by a city of use of streets could be successfully interposed to defeat paying rents for the use of hydrants furnished the city under a contract otherwise valid, and whether a city council could make a contract for a water supply for a term extending beyond the terms of its members. The case is not in point as controlling the case at bar.

The case of Atlantic City Water Works Company v. Atlantic City *et al.*, is one in which the chancellor, who had granted a temporary injunction or "stay," against the city's giving to others than complainant the right to lay pipes for furnishing water to the city and its inhabitants, expressed, *on granting a motion of the city to dissolve* the same, an opinion, that whether, or not, the city's grant to the complainant company of the exclusive privilege of furnishing water to the city *and its inhabitants was ultra vires and void* as creating a monopoly, the city had, so long as the company should continue to supply water, according to contract, exhausted its power as to providing a water supply; and further that the complainant's franchise was exclusive and the court would protect, by injunction, the complainant against any invasion of its rights by persons laying water pipes, *etc.*, under municipal authority, to compete with complainant. The motion of the city to dissolve was granted in the following language: "So long as the company shall continue to supply the city with pure and wholesome water at reasonable rates it will be entitled to protection against unlawful competition. It is not necessary to that protection, however, to prevent the city from granting permission to others to lay pipes. The remedy is to restrain such persons, whether natural or artificial, from availing themselves of the permission, to the prejudice and injury of the complainant. The motion will be granted."

It is respectfully submitted that if the statute of New Jersey did not authorize the city to grant to the company an exclusive right to supply water to the city and its inhabitants, the opinion of the chancellor is not sustained by the current of authorities controlling the question in like cases where there is a new grant to third parties In the absence of power to grant an exclusive right there can not be an exhaustion of the power.

In Southwest Mo. L. Co. v. City of Joplin, the distinguishing feature of the decision is "*that the city having adopted the alternative method of procuring light for the city and*

its inhabitants contemplated by the statute, it was an implied term of the contract, made by the acceptance of the ordinance, *that the city would not itself enter into competition with the grantee in supplying lights to private consumers during the term of the grant by means of a light plant erected under the powers conferred by the statute.*"

In view of the feature of the Tallahassee ordinance, pointed out above in discussing Bailey v. City of Philadelphia, it can not be held that there was any room for the implication that the city would not supply itself as a body corporate, or its inhabitants, with electricity, or that such inhabitants should not take either gas or electricity from other sources or should be required to take either from the Tallahassee Gas and Electric Light Company or its successors. The city had the right to commence supplying itself with electric light or any other illuminating agency than gas at once, or to have continued using oil or whatever other means of illumination it may have been using at the time the ordinance was passed or accepted. It could have established an electric light plant itself for the purpose stated. It had no power to provide for furnishing light to the inhabitants for their private or domestic purposes, and for the reason that the grant of power to it as to lighting the city, was only "to provide for the lighting of the streets," and this grant did not include the power of providing for private lighting. Dillion on Municipal Corporations (4th ed.), Secs. 89, 443; Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla. 229. Mauldin v. City Council, 33, So. Ca. 1. Spaulding v. Peabody, 153 Mass. 129. The general welfare clause did not do away with the limitation contained in the grant of power "to provide for the lighting of the streets." Such clause applies only to "*other act or acts*" than those provided for specifically by the statute. Dillon on Municipal Corporations, 443, 315, 316. State v. Ferguson, 33 N. H. 424.

As said in White v. City of Meadville, 177 Pa. St. 643, quoted in the decision now under discussion. "Both contract-

ing parties must be conclusively presumed to have had in view the law which empowered them to contract, and which became a part of the contract." As has been stated before, the city has never contracted to take for itself, or that its inhabitants should take for themselves either gas, or electricity, from the plaintiff in error or its predecessors. The ordinance was never intended, and does not pretend, to constitute, of itself, a contract between the city and the company for taking, or using either gas or electricity by the city or its inhabitants, but only to regulate certain features of any contract that might be entered into between the city and the company or the company and the people, *viz*: quality of gas, maximum price, *etc.* It does not fix the actual price, period of supply and other essential features of all contracts.

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NOTE:—The word "other" has been unintentionally omitted from the general welfare clause in the municipal statute as it is quoted on page 9 of the principal brief.

G. P. R.